No. 9509

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United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE H. CORNES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

Brief for Appellee

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REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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INDEX

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STATEMENT

We believe we can save the time of the Court by postponing any discussion of the testimony and facts until we reach our answer to appellant's Specification of Error VI, which is the specification in regard to the Court's denial of appellant's motion for a directed verdict.

In Appellant's Brief there are six specifications of error (pp. 15-16). The questions raised are as follows:

1. The sufficiency of the indictment (Specification of Error I);

2. Failure to furnish an additional bill of particulars (Specification of Error II);

3. Alleged error in admitting in evidence books and records of the corporations involved (Specification of Error III);

4. Refusal of the Court to keep the witness Wilson in attendance at Court (Specification of Error IV);

5. Receiving in evidence rebuttal testimony of Government's witness Hair (Specification of Error V);

6. Denying appellant's motion for a directed verdict (Specification of Error VI).

ARGUMENT

We shall take up appellant's specifications in the order in which they appear in his brief.

I.

(Appellant's Brief, pp. 17-19)

THE SUFFICIENCY OF THE INDICTMENT

Appellant's first attack on the indictment is based on the use of the word "would". It is contended that the indictment fails to allege that the defendants ever did any of the things which the indictment alleges the scheme contemplated they would do.

In an indictment charging violation of the mail fraud statute, it is only necessary to allege that a scheme was devised to obtain money by false or fraudulent pretenses, representations or promises. It is not

necessary to allege the success of the scheme or that any of the things contemplated were actually performed. The devising of the scheme and the use of the mails in furtherance thereof complete the offense. The use of the mails is the gist of the offense.

Brady v. *United States,* 24 F. (2d) 399;
Hass v. *United States,* 93 F. (2d) 427.

This indictment is not measured by the same rule as one charging the obtaining of money under false pretenses.

Emanuel v. *United States,* 196 Fed. 317.

The appellant also attacks the indictment on the ground that it is duplicitous. The indictment charges but one scheme—that was the scheme for sale of the stock and securities of the State Securities Corporation by false and fraudulent representations. The purpose of the organization of a life insurance company was not another scheme but merely one of the means used for the carrying out of the scheme for the sale of the securities of the State Securities Corporation. We quote from the indictment:

> "It was further a part of said scheme and artifice to have the State Securities Corporation purchase and obtain control of the Insurance Company for the purpose of aiding said defendants in the sale of stocks and bonds of said Corporation to the persons to be defrauded by means of false and fraudulent pretenses, representations and promises." (4)*

*Where figures alone appear they refer to pages in the Transcript of Record.

Appellate courts have upheld similar indictments.

Silkworth v. *United States,* 10 F. (2d) 711;

Hass v. *United States,* supra;

Sunderlan v. *United States,* 19 F. (2d) 202;

Scheib v. United States, 14 F. (2d) 75.

II.

(Appellant's Brief, pp. 19-22)

FAILURE TO FURNISH AN ADDITIONAL BILL OF PARTICULARS

The granting of a bill of particulars, or the extent to which a bill of particulars should be furnished, is within the sound judicial discretion of the trial court.

Muench v. *United States,* 96 F. (2d) 332;

Hass v. *United States,* supra;

Stumbo v. *United States,* 90 F. (2d) 828.

We wish to point out that in this case the bill of particulars was not upon order of the Court. When the demand for a bill of particulars was filed, the Government, in order to narrow the issues and save the time of the Court in going over each demand, furnished the appellant and other defendants with the bill of particulars in this record. The appellant thereupon filed objections to the bill furnished and demanded a further bill of particulars. It was upon this objection and demand that the Court entered its order denying the request for a further bill.

In the demand for a bill of particulars, there is much repetition. To these, the Government merely replied that they had been furnished in reply to prior

demands. The bill of particulars furnished (54-71), when read in conjunction with the indictment, fully advised appellant of all facts necessary for the preparation of his defense.

Paragraph III (55) of the bill informed appellant of the misrepresentations made, to whom made and when made. Paragraph VIII (56) of the bill supplements this information. Paragraphs XI, XII, XIII and XVII (57-58) of the bill give full information as to the mailing of the letters. Paragraph XXVI (59) supplements the information contained in the indictment and in paragraph III of the bill of particulars as to the false representations. Paragraph XXVIII (59-60) outlines defendants' connection with the companies. Paragraphs XIX to XXXII (60-61) itemize withdrawals of cash by each defendant. Paragraph XXXIII (61) gives definite information in connection with the write-up of the mortgage loans. Paragraph XXXV (62) itemizes the cash assets carried in the December, 1936 statement, which were received in 1937. Paragraph XXXVII (63) gives full information in regard to the falsity of the combined balance sheet of June 30, 1937. Paragraph XXXVIII (64-68) sets out in full the letter requested in the demand. Paragraph XLII (68) sets out in detail the falsity of the annual statement of the life insurance company for the year 1936. Paragraphs XLIV and XLV (69) give full particulars as to the falsity of the letter of March 2, 1938. Paragraphs XLVI to XLVIII (70) comply with appellant's demand as to the mailing of the letter of March 2, 1937.

On page 21 of Appellant's Brief, he contends that the answer to the demand in paragraph XLIX (70) of the bill of particulars is not sufficient because the difference between the two statements referred to is

not fairly and fully disclosed (70). The answer to this demand states that the difference between the financial statement referred to in paragraph 5 of the Sixth Count of the indictment and a financial statement referred to in paragraph 3 of the Sixth Count of the indictment is merely in the form of the statements or grouping of the items.

Appellant also complains because the Government was not compelled to furnish appellant with copies of financial statements and reports filed with the Corporation Commission of the State of Arizona or furnish appellant with copies of reports filed with Dunne's Insurance Reports. The trial court evidently felt, and properly so, that the office of the Corporation Commission of the State of Arizona was open to the defendants, and that they were in as good a position as the Government to secure copies of reports or statements filed with such Commission and copies of reports furnished Dunne's Insurance Reports. As a matter of fact, there was no direct evidence at the trial that appellant, or any of the defendants, directly furnished Dunne's Insurance Reports with any financial statements. The statement contained in Dunne's Insurance Reports evidently was based on statements filed with the Arizona Corporation Commission.

Appellant failed to point out a single instance during the trial of the case where he was prejudiced by the lack of any information or that he was placed at any disadvantage by failure of the Government to furnish further information.

Appellant Cornes took part in the organization of the State Securities Corporation; he was president of the State Securities Corporation (781-782); he was president and a member of the board of directors and

of the executive committee of the State Securities Corporation (785); he was vice president and secretary of the Union Reserve Life Insurance Company (788). His connection with the companies involved and with the representations charged in the indictment will be discussed in detail in our answer to appellant's Specification of Error VI.

III.

(Appellant's Brief, pp. 22-38)

ALLEGED ERROR IN ADMITTING IN EVIDENCE BOOKS AND RECORDS OF THE CORPORATIONS INVOLVED.

On pages 23 and 24 of his brief, appellant lists the exhibits, together with the pages of the record, where testimony will be found in reference to these exhibits and laying the foundation for their admission in evidence.

A fair example of the foundation laid for the admission of these exhibits is found on pages 264 and 265 of the record with reference to Government's Exhibit 12. Witness Wilson testified that he made all the entries in the regular course of business, and then described the method of making the entries and told where the information for these entries came from. This testimony was ample to show that the exhibit was admissible in evidence.

Government's Exhibit 7 was a public record of the Arizona Corporation Commission (698).

As to Government's Exhibit 24, we can find no objection in the record to its admission in evidence.

With reference to the minutes of the meetings, Government's Exhibits 26A (394), 26B (398) 26C

(401), 26D (547), 26E (548), 26F (549), 26G (551), 26H (553), 26I (555), 26J (559), 26K (560), 26L (561), 26L-1 (565), 26M (566) 26N (570), 260 (585), 26P (586), 26Q (587), 26R (589), 26S (590), 26T (591), 26U (592), 26V (597), 26W (603), 26Y (608), and 27A (288), 27B (291), 27C (293), 27D (387), 27E (391), it is uncontradicted that they were written up at the direction of one of the defendants, Raymond F. Marquis, according to the testimony of Harriet Walker and the defendant Raymond F. Marquis' own admission, hereafter quoted in this brief, and, therefore, became the act of a co-conspirator performed in furtherance of the conspiracy. If they do not correctly reflect what actually took place, if one of the co-conspirators falsified them in any particular, there certainly can be no rule of law permitting him, or his co-conspirators, to take advantage of such falsification and prevent their admission in evidence. To permit a defendant to take advantage of his own wrong-doing would be a dangerous precedent. There is no testimony in the record on the part of Raymond F. Marquis, the defendant directly responsible for the preparation of the minutes, to the effect that they were not properly prepared and did not correctly reflect transactions. All of the defendants, including appellant, were permitted to testify and introduce evidence regarding the contents of Government's Exhibits 26 and 27. This left the matter a question of fact for the jury, which was all appellant was entitled to.

The testimony of Harriet Walker, quoted in Appellant's Brief on pages 32 to 34, on cross-examination, to the effect that she did not know whether appellant Cornes attended the meetings or not, is negative testimony.

The defendant Raymond F. Marquis, in regard to the preparation of the minutes (704), testified as follows:

"The practice of writing up the minutes was, wherever possible to have regular formal meetings by everybody, the minutes of which were to be reported. Where Mr. Cornes, Mr. Harry Marquis and other members of the executive committee were away on business, if a question had to be determined, action had to be taken, the minutes were written up and then discussed and taken up with them when they returned. It was done when all members of the executive committee were not present at the time the action was taken. Those were cases in which I had to exercise my judgment. I wrote up a record of the situation so that at any time we could determine what was done. The minutes were not always typed on the dates on which the meetings were held. The data was given to the girl, sometimes written out in full and sometimes from notes taken and dictated at a later date. The minutes of meetings of the directors were transcribed and typed into the book at a later date. Whoever acted as secretary kept the minutes in lead pencil or pen and ink, and then sometimes later they were transcribed in the book. That is also true of stockholders' meetings. At the stockholders' meetings some were present in person and some represented by proxies. It was our custom when stock was sent out to send a receipt for stock and a proxy for the number of votes of the stock, have that signed and returned. Some proxies were given to Mr. Cornes, some to myself and I think some to others. These were the proxies mentioned in the minutes of the stockholders."

In addition to the pages in the record referred to in Appellant's Brief on pages 23 and 24, the Court's attention is respectfully called to the following pages where additional testimony will be found.

Assignments	Exhibits	T. of R.
XIII	8	295
XV	11	263, 298
XVI	10	263
XVIII	9	262
XIX	7	308, 698
XXII	14	268
XXIII	17	278, 309
XXIV	15	269
XXX	13	268, 270, 272
XXXI	18	278
LI	48A-29B	411, 690
LII	54	549
LIV	34	375, 376, 465
LVI	33	480
LVII	41	351

Government's Exhibits 1 to 6 were records of the Arizona Corporation Commission and were so identified by witness Ethel, Secretary of the Arizona Corporation Commission (245-252). This was sufficient to identify them as public records. The records themselves show their materiality.

This Court has held, where documents are not sufficiently identified but are similar to others which have been identified, that they are admissible.

Mitchell v. *United States,* 23 F. (2d) 260.

IV.

(Appellant's Brief, pp. 39-43)

REFUSAL OF THE COURT TO KEEP THE WITNESS WILSON IN ATTENDANCE AT COURT.

The witness King Wilson identified certain books and records that were kept by him, or in which he had made some entries. The purpose of his testimony was to lay the foundation for their introduction in evidence. As to many of these records, it was necessary to have the testimony of other witnesses before the exhibits were admissible.

Appellant complains because Wilson was not kept in attendance at Court for cross-examination until all of the exhibits were introduced in evidence. Any questions which it would have been proper to have asked the witness Wilson at any time during the trial could have been asked him at the close of his direct examination. There is no merit in appellant's contention that he should have been kept at attendance during a long and protracted trial. He cites no authorities sustaining his claim. There was no abuse or discretion on the part of the Court, and appellant has failed to show where he was prejudiced in any manner whatsover.

V.

(Appellant's Brief, pp. 44-46)

RECEIVING IN EVIDENCE REBUTTAL TESTIMONY OF GOVERNMENT'S WITNESS HAIR

It is immaterial whether this testimony was proper rebuttal or whether it should have been introduced in the case in chief. Its admission in rebuttal was within the sound judicial discretion of the Court.

Golsby v. *United States,* 160 U. S. 70; 16 Sup. Ct. 216.

The witness Hair was permitted to testify in regard to what Government's Exhibit 18 disclosed. Government's Exhibit 18 was admitted in the case in chief (350). The witness also testified from Government's Exhibit 23, admitted in evidence in the case in chief (353). These exhibits disclosed that J. Elmer Johnson had received money from the corporations involved in this case. Johnson was in the employ of the Arizona Corporation Commission up to the early part of 1935 (896). At least part of the transactions with the Corporation Commission regarding the sale of securities was had with Johnson (897). He had made an examination of the company and made a report to the Commission (670, 728, 729). The purpose of the testimony of Mr. Hair was to explain to the jury the entries in the books in evidence disclosing transactions between Johnson and the companies involved, in order that the jury might determine whether or not the officers of the company, in using Mr. Johnson's report and relying thereon, were doing so in good faith, in view of the fact that during part of the time, at least, he was receiving payments in cash from the company.

VI.

(Appellant's Brief, pp. 46-54)

DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

It cannot be seriously questioned that there was a scheme to defraud as charged, and that there was a conspiracy to violate Section 338, Title 18, of the

United States Code Annotated. Three of the defendants stand convicted and have taken no appeal. The only question to be determined with reference to appellant is whether or not he joined in the scheme and conspiracy. To determine this fact requires a consideration of the evidence. If there is any substantial evidence connecting the appellant with the scheme and conspiracy, then the motion for a directed verdict was properly denied and the judgment should be affirmed.

Appellant admits he was an officer of both companies; that he was closely associated with the other defendants and that he frequently discussed policies and details of the business with them (Appellant's Brief, pp. 47-48). He also admits his activities as salesman in the sale of securities. Appellant claims, however, that he was but a nominal officer; that he knew little of the companies' affairs and that he relied upon others for his information as to the financial condition of the companies and as to the truth of representations made by him.

Appellant should not be permitted to plead his own negligence as an officer as a defense in this case.

We have heretofore referred to some of the evidence connecting appellant to the scheme and conspiracy. We shall now, as briefly as possible, further outline his activities:

Appellant joined in the organization of the State Securities Corporation and was elected president in 1932 (781-782); as such officer he signed checks and stock certificates (784), and attended meetings of stockholders, board of directors and executive committees (785-832). He was also vice president and secretary of the Union Reserve Life Insurance Com-

pany (788). He executed, as trustee, notes and mortgages, which were written up in value on the books of the company (791). There was no personal liability on those notes and mortgages, owing to the fact that they were executed as trustee. It is evident that the execution of the notes and mortgages for increased amounts was merely for the purpose of padding the assets.

Appellant is responsible for the contents of Government's Exhibit 40 (342). "It was dictated by him (Cornes)"—testimony of witness Anderson (341). In this letter (Government's Exhibit 40), appellant stated: "When we were organized, a certain amount of stock was allotted and paid for by the incorporators at the rate of $10.00 per share, this was placed in escrow". Appellant admitted that this statement was false (790).

On December 28, 1937, appellant learned what, as an officer of the company, he should have known before, that the reinsurance had been cancelled (809, 841), and consequently that the company was in financial difficulties. Nevertheless, he continued to sell stock subsequent to January 1, 1938 (832), and continued making the same representations as he had made prior to that time (824).

In June, 1937, appellant told witness Haymes that a cash dividend would be paid (541): "He said that there would be a cash dividend. He did not say a stock bonus of five percent" (542).

Appellant made the representation that the officers of the companies were not drawing salaries: "I did represent that the officers of the corporation and of the insurance company were not drawing salaries from

either of said companies" (807). The record shows that Raymond F. Marquis drew a total of $90,995.37 (620). Much of this amount was drawn on checks signed by appellant. Raymond F. Marquis was not a stock salesman and, therefore, there could be no pretense that this amount was in payment of commission. It was, in fact, a salary. Defendant Harry S. Marquis drew a total of $51,940.28 (622). He sold no stock after 1933. He testified that the amount paid him was for living expenses for himself and family (868). No matter how disguised, it was still a salary. Appellant himself drew $88,319.13, and this did not include the amounts received for expenses and traveling (621). He drew a check regularly every week (820). The amounts of these checks were not based upon sales of stock and were, in fact, salary.

Appellant says he never made any effort to determine how much Raymond F. Marquis or Harry S. Marquis was drawing from the company (830).

When we take into consideration appellant's activities in the organization of the corporation, attendance at meetings, signing of letters and financial statements in his official capacity, his representations as to cash dividends, financial condition of the companies, salaries of the officers, etc., there seems to be ample evidence connecting him with the scheme and conspiracy.

If the evidence of appellant's activities is not sufficient to sustain the verdict of guilty, it is difficult to conceive what one would have to do in order to join or take part in a scheme or conspiracy. One cannot close one's eyes and ears to obvious facts and es-

cape punishment on a plea of ignorance or lack of knowledge of such facts.

CONCLUSION

The verdict of guilty on Counts Three, Four and Six should be sustained.

Respectfully submitted,

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